IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellant,

v.

DANIEL DEAN RAINSONG,

Defendant-Appellee.

S.CT. NO. 10-1543

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR STORY COUNTY
HONORABLE TIMOTHY J. FINN, JUDGE (MOTION HEARING)

APPELLEE'S BRIEF AND ARGUMENT AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

MARK C. SMITH No. AT0007410
State Appellate Defender

VIDHYA K. REDDY No. AT0009767
Assistant Appellate Defender
vreddy@spd.state.ia.us

STATE APPELLATE DEFENDER
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLEE

CERTIFICATE OF SERVICE AND FILING

On the 6th day of May, 2011, the undersigned certifies that a true copy of the foregoing instrument was served upon the Attorney General's Office, Criminal Appeals Division by electronic transmission to: CAmail@ag.state.ia.us and on Defendant-Appellee by placing one copy thereof in the United States mail, proper postage attached, addressed to Daniel Dean Rainsong, 1916 Ferndale Ave., Ames, IA, 50010.

I further certify that on May 6, 2011, I will file this document by mailing 18 copies of it to the Clerk of the Supreme Court, Iowa Judicial Building, 1111 East Court Avenue, Des Moines, Iowa 50319 through Iowa State Capitol Complex Local Mail.

APPELLATE DEFENDER'S OFFICE

Vidhya K Reddy

VIDHYA K. REDDY
Assistant Appellate Defender

VKR/d/4/11
VKR/sm/5/11

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Court Rules:

Other Authority:

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE INTRODUCTION OF LOREN RADFORD'S AUGUST 5, 2010 RECORDED TESTIMONY, IN LIEU OF HIS PERSONAL APPEARANCE AT TRIAL, WOULD VIOLATE RAINSONG'S CONFRONTATION RIGHTS?

Authorities

State v. Hallum, 606 N.W.2d 351, 354 (Iowa 2000)

U.S. Const. amend. VI

U.S. Const. amend. XIV

Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)

Iowa Const. art I, § 10

Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1363, 158 L.Ed.2d 177 (2004)

State v. Kellogg, 385 N.W.2d 558, 560-62 (Iowa 1986)

State v. Froning, 328 N.W.2d 333, 336 (Iowa 1982)

State v. Schaer, 757 N.W.2d 630, 635 (Iowa 2008)

State v. Holland, 389 N.W.2d 375, 379 (Iowa 1986)

State v. Zaehringer, 325 N.W.2d 754, 758 (Iowa 1982)

Edwards v. Edwards, 61 N.W. 413 (Iowa 1984)

Iowa R. Evid. 5.804

People v. Diefenderfer, 784 P.2d 741, 750 (Colo. 1990)

State v. Kite, 513 N.W.2d 720, 721 (1994)

Burns v. Clausen, 798 F.2d 931, 937 (7th Cir. 1986)

U.S. v. Faison, 679 F.2d 292, 296-98 (3rd Cir. 1982)

State v. Gregg, 464 N.W.2d 431, 434 (Iowa 1990)

State v. Liggins, 557 N.W.2d 263, 269 (Iowa 1996)

United States v. Sutherland, 656 F.2d 1181, 1201 (5th Cir. 1981)

Kenneth S. Broun, et. al. McCormick on Evidence § 302 (6th ed. 2006)

California v. Green, 399 U.S. 149, 165-66, 90 S.Ct. 1930, 1938-39, 26 L.Ed.2d 489 (US 1970)

United States v. Avants, 367 F.3d 433, 444 (5th Cir. 2004)

Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968)

State v. Dean, 332 N.W.2d 336, 339 (Iowa 1983)

Coy v. Iowa, 487 U.S. 1012, 1020, 108 S.Ct. 2798, 2802, 101 L.Ed.2d ___ (1988)

Melendez-Diaz v. Mass., ___ U.S. ___, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009)

Otteson v. Iowa Dist. Court for Linn County, 443 N.W.2d 726, 727-28 (Iowa 1989)

Iowa R. Crim. P. 2.27

Iowa R. Crim. P. 2.13

Blanton v. State, 978 So.2d 149, 155 (Fla. 2008)

Lopez v. State, 888 So.2d 693, 701 (Fla. Dist. Ct. App. 2004)

State v. Yaw, 398 N.W.2d 803, 804 (Iowa 1987)

Davis v. Washington, 547 U.S. 813, 833, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)

State v. Hamilton, 309 N.W.2d 471, 477 (Iowa 1981)

State v. Weaver, 608 N.W.2d 797, 801 (Iowa 2000)

ROUTING STATEMENT

Defendant agrees that this case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Plaintiff-Appellant State of Iowa from an adverse ruling by the Story County District Court on the State's "Notice of Unavailability and Motion to Substitute Deposition of Witness" Loren Radford. The State applied for and was granted discretionary review.

Course of Proceedings: On February 23, 2010, the State charged Rainsong with two counts of Theft in the First Degree, a Class C Felony, in violation of Iowa Code sections 714.1, 714.2, and 714.2(1) (2009) (Counts 1 and 2), and one count of Dependent Adult Abuse, a Class C Felony, in violation of Iowa Code sections 235B.2(5)(a)(1)(c) and 235B.20(5) (2009) (Count 3). The State also alleged that Rainsong was a habitual offender in violation of Iowa Code section 902.8 (2009). (Trial

Information) (App. pp. 1-2). Rainsong plead not guilty on March 1, 2010. (Written Arraignment and Plea of Not Guilty) (App. pp. 8-9).

On March 16, 2010, Rainsong filed a notice of intent to take depositions of the individuals listed in the State's trial information. (3/16/10 Not. of Intent to Take Depos.) (App. p. 11). Defendant agreed to proceed by telephonic deposition of State's witness Loren Radford, who resided in Pendleton, Oregon. (9/15/10 Tr. p.40 L.19-20) (App. p. 80). Mr. Radford's deposition was scheduled for April 2, 2010 at 3:00 pm. (3/24/10 Subpoena of Loren Radford) (App. p. 12). However, at some point, the State notified defense counsel that Mr. Radford had suffered a stroke which rendered him unable to speak or communicate by telephone.[1] The State informed defense counsel that, if Defendant chose to depose Mr. Radford, Defendant would have to mail written deposition questions to Mr. Radford in advance, so that Mr. Radford could type out his answers, and someone else could read the

[1] According to the affidavit of Mr. Radford's physician, Dr. Russell Harrison, Mr. Radford's stroke had occurred in September 2009. (State's Exhibit 1) (App. p. 44).

written answers out loud during the deposition. (9/15/10 Tr. p.31 L.7-23, p.40 L.2-7, p.40 L.19-23) (App. pp. 71, 80). Believing such a procedure would render the resulting deposition testimony vulnerable to manipulation by Mr. Radford's daughter Patricia Waters, Defendant elected not to depose Mr. Radford. (9/15/10 Tr. p.40 L.19-p.41 L.11) (App. pp. 80-81).

Thereafter, Defendant filed several Notices of Defense Witnesses. (4/9/10, 4/22/10, 5/19/10 Notices of Def. Witnesses) (App. pp. 15-18, 22). Mr. Radford was not listed as a Defense witness. (4/9/10, 4/22/10, 5/19/10 Notices of Def. Witnesses) (App. pp. 15-18, 22).

Trial was scheduled for May 25, 2010. (3/8/10 Record of Written Arraignment and Order for Trial) (App. p. 10). On May 5, 2010, the parties filed a joint motion to continue trial in order to allow additional time for completion of discovery. (5/5/10 Joint Mot. to Continue) (App. p. 19). The motion was granted and trial was continued to June 8, 2010. (5/5/10 Order) (App. p. 20).

On June 1, 2010, the State filed a second motion to continue trial, stating that Mr. Radford had suffered a second stroke on May 26, 2010, and requesting a continuance to allow time for his full recovery prior to trial. (6/1/10 Mot. to Continue) (App. pp. 23-24). Defense counsel did not object, and the State's Motion was granted. Trial was continued to August 10, 2010. (6/1/10 Order) (App. p. 25).

On June 4, 2010, the State filed a third Motion to Continue trial on grounds that one of the State's witnesses, David Shaw of the Department of Human Services (DHS), would be unavailable on the existing trial date. (6/4/10 State's Second Mot. to Continue) (App. p. 26). A June 28, 2010 hearing was held, at which defense counsel resisted the continuance on grounds that Mr. Shaw was merely a cumulative witness. (Def.'s Exhibit A p.11 L.3-p.12 L.3, p.13 L.20-p.14 L.25) (App. pp. 31-34). During the hearing, defense counsel also informed the court that she received a letter from the prosecuting attorney expressing concerns that Mr. Radford may not be available for the August 10 trial due to health concerns, and requesting to do a deposition of Mr. Radford by

teleconference. Defense counsel stated that Rainsong wished to exercise his due process right to have Mr. Radford present at trial and subject to cross-examination before the jury, and expressed concern that if additional continuances were issued, Mr. Radford might become unavailable. (Def.'s Exhibit A p.12 L.4-20) (App. p. 32). The State acknowledged that it "has concerns that [Mr. Radford's] not going to be available for trial" but stated that "the issue of whether Mr. Radford is going to be available for trial is not before the Court right now" and requested that "the Court not consider... this correspondence with [Defense counsel]" in ruling on the State's request for continuance (Def.'s Exhibit A p.12 L. 23-p.13 L.19) (App. pp. 32-33). At the conclusion of the hearing, the district court ruled that good reason existed to continue the trial due to the unavailability of Mr. Shaw, and rescheduled trial to commence on August 28, 2010. (Def.'s Exhibit A p.15 L.1-p.16 L.25; 7/6/10 Order) (App. pp. 35-36; 38).

On July 12, 2010 the State filed a "Notice of Deposition," expressing "concerns that [Mr. Radford] is unavailable to travel back to Iowa for trial," and purporting to "hereby offer[]

Defendant an opportunity to confront [Mr. Radford by deposing him] prior to trial at the... time and place" listed therein. (7/12/10 Not. Of Depo) (App. pp. 40-41). The Notice stated that defense counsel had already declined a May 18, 2010 oral offer by the State to fly the prosecutor, defense counsel, and Defendant to Oregon to conduct an in-person videotaped deposition of Mr. Radford, with the understanding that, if Mr. Radford was unavailable at trial, the State would play the videotaped deposition in lieu of his personal appearance. The Notice stated that, as an alternative, "the State offers to allow Defendant to conduct a deposition of [Mr. Radford] by video teleconference" with the State, defense counsel, and Defendant participating from the United States Attorney's Office in Des Moines, while Mr. Radford and a court reporter participated from the United States Attorney's Office in Yakima, Washington. The Notice stated that, the "deposition of [Mr. Radford] will begin on August 5th, 2010 at 11 a.m. to 5:00 p.m." and may "continue on August 6th, 2010 at 11:00 am to 5:00 pm." The Notice further stated that, "on June 28, 2010, the State was informed by defense counsel

that Defendant chose not to participate in the deposition," but stated that "[t]he State will conduct a deposition and direct examination of [Mr. Radford] regardless of the Defendant's participation" and that "if [Mr. Radford] is ultimately deemed unavailable for trial, the State intends to use this deposition and direct examination in lieu of his personal appearance." The Notice closed by stating that "Because the State is simply providing notice to Defendant we do not request a hearing at this time." (7/12/10 Not. of Depo.) (App. pp. 40-41).

On July 29, 2010, Rainsong filed a Demand for Face to Face Confrontation and Resistance to State's Notice of Deposition. (7/29/10 Resistance to Not. of Depo.) (App. pp. 42-43). In this document, Defendant expressed the desire to exercise his right to face-to-face confrontation of Mr. Radford in front of a jury in open court, expressed concerns that a teleconference or videotaped interview was susceptible to manipulation by third parties and would not permit jury observation in a trial environment, and noted that despite the State's offer to pay the costs of travel associated with conducting a personal deposition in Oregon it was clear that

"[a]t the conclusion of the case, the State will request that the Defendant reimburse all court costs including the costs associated with the Oregon trip." The document further noted that it was "the State's decision to continue this case and not the Defendant's actions that have increased the risk of witness unavailability." Finally, the document argued that, under the terms of Iowa Rule of Criminal procedure 2.13, the Defendant was permitted but not required to depose the State's witnesses and, because Mr. Radford was not listed as a Defense witness, the State had no right to conduct its own deposition of Mr. Radford. (7/29/10 Resistance to Not. of Depo.) (App. pp. 42-43).

Despite receiving Rainsong's Demand for Face to Face Confrontation and Resistance to State's Notice of Deposition, the State made no application to the court requesting authorization to conduct a deposition of its own witness for perpetuation purposes. Instead, on August 4, 2010, the State filed a "Notice of Unavailability," stating that "[w]hile the Defendant has indicated no intention to participate in the deposition the State will proceed in order to preserve [Mr.

Radford's] testimony and use this deposition in lieu of his personal appearance at trial." (8/4/10 Not. of Unavailability) (App. p. 46).

Defendant filed an August 5, 2010 Demand for Face to Face Confrontation and Resistance to State's Notice of Unavailability, arguing that Mr. Radford was not an unavailable witness, and demanding that he be present at trial. (8/5/10 Resistance to Not. of Unavailability) (App. p. 47).

The State proceeded with the August 5, 2010 examination of Mr. Radford by video teleconference without any special court authorization. Neither Rainsong nor his counsel participated in the August 5 examination. (9/23/10 Order p.3) (App. p. 102).

On September 10, 2010, the State filed a motion to substitute the deposition of Mr. Radford in lieu of his personal appearance at trial. (9/10/10 Mot. to Substitute Depo.) (App. pp. 53-60). The State alleged that Mr. Radford was an unavailable witness, and subsequently offered affidavits from his physician and his daughter in support of this claim.

(9/15/10 Tr. p.26 L.2-p.29 L.2; State's Exhibits 1 and 2) (App. pp. 66-69; 44-45, 48-51). The State further argued that, pursuant to Iowa Rule of Evidence 5.804(b)(1), the unavailable witness's deposition testimony would not be hearsay, and "the court must substitute Mr. Radford's Deposition Testimony from August 5, 2010 in lieu of his personal appearance at trial because the defendant was given an opportunity to confront Mr. Radford and subsequently waived his right of confrontation" by declining the State's efforts to facilitate a deposition of Mr. Radford. The State thereby requested that the court permit it to use Mr. Radford's testimony from the August 5, 2010 "deposition" in which only the State and not the Defendant participated. (9/10/10 Mot. to Substitute Depo.) (App. pp. 53-60).

Defendant filed a September 10, 2010 Resistance arguing that Mr. Radford was not unavailable, that the hearsay exception for former testimony under Iowa Rule of Evidence 5.804(b)(1) did not apply because the so-called 'deposition' testimony was not taken in compliance with the law, and that the Defendant did not waive his confrontation rights.

(9/10/10 Resistance to Mot. to Substitute Depo.) (App. pp. 61-62). Following a September 15, 2010 hearing, the district court denied the State's motion to substitute Mr. Radford's April 5, 2010 deposition testimony in lieu of his personal appearance at trial. (9/15/10 Tr. p.1 L.1-p.3 L.11, p.26 L.2-p.59 L.1; 9/23/10 Order) (App. pp. 63-99; 100-105).

On September 27, 2010, the State sought discretionary review of the district court's order, and Defendant resisted. (9/27/10 App. for Discretionary Review; 9/28/10 Resistance to App. for Discretionary Review) (App. pp. 106-116). On October 1, 2010 the Iowa Supreme Court granted the State's application and stayed the proceedings in the district court. (10/1/10 Sup. Ct. Order) (App. p. 117).

Facts: According to the Trial Information and Minutes of Testimony filed in the instant case:

In late 2008, the Iowa Department of Human Services (DHS) initiated an investigation of a case of suspected elder fraud involving Defendant Daniel Dean Rainsong, Defendant's mother Lisa Radford, and Ms. Radford's husband Loren Radford. In November 2008, Loren Radford made

arrangements to move to Oregon and live in a home directly behind that of his daughter, Patricia Waters. Because Lisa Radford would be remaining in Iowa, the Radfords made arrangements to equally split their joint savings account of approximately $32,000 into separate bank accounts. Prior to leaving for Oregon, Loren Radford gave Rainsong a blank check from Loren Radford's separate account for the payment of some of Lisa Radford's medical bills.

The State charged that, from November 2008 through March 2009, Rainsong committed theft on Loren and Lisa Radford, and dependent adult abuse on Lisa Radford by: writing Loren Radford's blank check for $15,000 and depositing the money into Lisa Radford's bank account, obtaining power of attorney over Lisa Radford, and spending approximately $30,000 from Lisa Radford's bank account in a manner inconsistent with the power of attorney and on expenses unrelated to Lisa Radford's medical care. (Trial Information; Minutes of Testimony) (App. pp. 1-2; 3-7).

Other relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN RULING THAT THE INTRODUCTION OF LOREN RADFORD'S AUGUST 5, 2010 RECORDED TESTIMONY, IN LIEU OF HIS PERSONAL APPEARANCE AT TRIAL, WOULD VIOLATE RAINSONG'S CONFRONTATION RIGHTS.

The district court properly denied the State's request to submit Mr. Radford's August 5, 2010 recorded testimony in lieu of his personal appearance at trial. Because the State failed to establish (1) that Mr. Radford was an unavailable witness and (2) that Rainsong waived or forfeited a prior opportunity to cross-examine Mr. Radford, the district court's ruling should be affirmed.

A. Preservation of Error: Defendant-Appellee agrees error was generally preserved for appeal by the State's "Notice of Unavailability and Motion to Substitute Deposition of Witness" and the district court's denial thereof. (9/10/10 Mot. to Substitute Depo.; 9/23/10 Order) (App. pp. 53-60; 100-105).

B. Standard of Review: Constitutional claims, including Confrontation Clause claims, are reviewed *de novo.* State v. Hallum, 606 N.W.2d 351, 354 (Iowa 2000). The

reviewing court "independently evaluate[s] the totality of the circumstances as evidenced by the whole record" but "give[s] weight to the district court's findings of fact because that court had the opportunity to personally assess the credibility of the witnesses." Id.

C. Discussion: The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Pursuant to the Fourteenth Amendment of the United States Constitution, the federal confrontation right is obligatory in state as well as federal prosecutions. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Article I, section 10 of the Iowa Constitution also protects confrontation rights. Iowa Const. art I, § 10 ("In all criminal prosecutions... the accused shall have a right... to be confronted with the witnesses against him").

"[T]he principal evil at which the Confrontation Clause was directed was...[the] use of *ex parte* examinations as evidence against the accused." Crawford v. Washington, 541

U.S. 36, 51, 124 S.Ct. 1354, 1363, 158 L.Ed.2d 177 (2004). Thus the primary and "indispensible" protection afforded by the confrontation right is the opportunity for cross-examination of witnesses. State v. Kellogg, 385 N.W.2d 558, 560-62 (Iowa 1986). Also encompassed in the Confrontation Clause, however, is the "secondary" right to have the jury personally observe the declarant's behavior and demeanor during examination. Id. (noting that this "secondary concern" of the Confrontation Clause "must sometimes give way to considerations of public policy and the necessities of the case."). See also State v. Froning, 328 N.W.2d 333, 336 (Iowa 1982).

In Crawford v. Washington, the United States Supreme Court held that, while the admission of "non-testimonial" out-of-court statements is governed only by evidentiary hearsay rules, "testimonial" out-of-court statements must additionally satisfy the Confrontation Clause before being admitted at trial. Crawford, 541 U.S. at 68, 124 S.Ct. at 1374, 158 L.Ed.2d 177. While the Confrontation Clause and hearsay rules serve similar and overlapping purposes, the Confrontation Clause

may prohibit the admission of evidence even where a hearsay exclusion or exception applies. Id., 541 U.S. at 60-61, 124 S.Ct. at 1369-70, 158 L.Ed.2d 177.

Pursuant to the Confrontation Clause, testimonial statements of witnesses absent from trial may be admitted only where (a) the declarant is unavailable and (b) the defendant has had a prior opportunity to cross-examine the declarant. Id., 541 U.S. at 59-68, 124 S.Ct. at 1369-74, 158 L.Ed.2d 177. When a defendant challenges the admissibility of a hearsay statement under the Confrontation Clause, the burden of establishing compliance with the constitutional standard lies with the State. See State v. Schaer, 757 N.W.2d 630, 635 (Iowa 2008); State v. Holland, 389 N.W.2d 375, 379 (Iowa 1986).

Here, the State acknowledges that the pertinent statements of Mr. Radford are testimonial and, therefore, subject to the requirements of the Confrontation Clause under Crawford. (State's Br. p.13-14). See Crawford, 541 U.S. at 51, 124 S.Ct. at 1364, 158 L.Ed.2d 177 (noting that "testimonial" statements include "*ex parte* in-court testimony or its

functional equivalent such as affidavits, depositions, prior testimony,... confessions,... [or other] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.").

Because the State failed to establish (1) that Mr. Radford was an unavailable witness and (2) that Rainsong was afforded a sufficient prior opportunity to cross-examine Mr. Radford and waived or forfeited that opportunity, the district court properly denied the State's Motion to substitute Mr. Radford's August 5, 2010 testimony in lieu of his personal appearance at trial.

1. Unavailability:

As the State acknowledges, the district court's Order denying the State's motion to substitute Mr. Radford's recorded testimony did not explicitly find that Mr. Radford was unavailable for trial. (State's Br. p.14). (9/23/10 Order) (App. p. 101). Defendant disagrees with the State's contention that an understanding of unavailability due to existing physical illness was implicit in the court's ruling. (State's Br. p.14).

The portions of the court's Order cited by the State were mere recitations of the statements contained in the affidavits of Mr. Radford's physician, Dr. Russell Harrison, and Mr. Radford's daughter, Patricia Waters. (State's Exhibits 1 and 2; 9/23/10 Order) (App. pp. 44-45, 48-51; 101). The court made no judgment as to either the veracity or accuracy of these statements, nor the question of whether the facts expressed therein would result in a finding of unavailability. (9/23/10 Order) (App. p. 101).

The State bears the burden of establishing a witness's unavailability at the time of trial. State v. Zaehringer, 325 N.W.2d 754, 758 (Iowa 1982); Edwards v. Edwards, 61 N.W. 413 (Iowa 1984). Iowa Rule of Evidence 5.804 defines witness "unavailability" to include a declarant who "[i]s unable to be present or to testify at the trial or hearing because of death or then existing physical or mental illness or infirmity." Iowa R. Evid. 5.804(a)(4). However, "mere inconvenience or discomfort at the prospect of testifying does not meet the statutory standard of unavailability." People v. Diefenderfer, 784 P.2d 741, 750 (Colo. 1990). Neither does economic hardship of an

out-of-state witness satisfy the unavailability standard, where such hardship can be alleviated by the State's payment of travel expenses. State v. Kite, 513 N.W.2d 720, 721 (Iowa 1994).

Where the State argues a witness is unavailable because of illness, "the judge must consider both the duration and the severity of the illness." Burns v. Clausen, 798 F.2d 931, 937 (7th Cir. 1986). While the duration need not be permanent, it should "be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed." Id. See also U.S. v. Faison, 679 F.2d 292, 296-98 (3d Cir. 1982). Moreover, "the time interval between the medical examination of the witness and the determination of unavailability is highly relevant." Burns, 798 F.2d at 939 (fact that nearly two months elapsed between doctor's last direct contact with the witness rendered the finding of unavailability, and the record supporting, it "stale"). See also State v. Gregg, 464 N.W.2d 431, 434 (Iowa 1990) (where physician's personal observations of child were completed almost a year and a half prior to hearing, and present evaluation was based on

communications with child's mother and teacher, record did not establish unavailability of child). This is particularly true where the witness's more recent activities, which the physician may have been unaware of, strongly bear on the unavailability determination. Burns, 798 F.2d at 939.

The facts recited in the Harrison and Waters affidavits fail to establish that Mr. Radford was unavailable for trial.

Dr. Harrison's affidavit stated that Mr. Radford suffered a stroke in September 2009. (State's Exhibit 1) (App. p. 44). While, the State's June 1, 2010 request for a continuance of trial had been based on statements by Ms. Waters that Mr. Radford had suffered a second stroke or other medical incident on May 26, 2010, neither Ms. Waters' nor Dr. Harrison's affidavits made any mention of such episode. (6/1/10 Mot. to Continue; State's Exhibits 1 and 2) (App. pp. 23-24; 44, 48-50).

Dr. Harrison stated that the September 2009 stroke affected mainly Mr. Radford's speech but not his cognitive effects, physical strength, or use of his limbs. (State's Exhibit 1) (App. p. 44). See State v. Liggins, 557 N.W.2d 263, 269

(Iowa 1996) (76-year-old witness deemed unavailable to testify because he appeared confused and disoriented, and displayed difficulties with memory.). While Dr. Harrison's affidavit did note that the stroke left Mr. Radford with "some slurred speech" and "difficulty expressing himself," (State's Exhibit 1) (App. p. 44), Mr. Radford's expressive abilities apparently either remained sufficiently strong or improved enough to permit the State's August 5, 2010 examination of him by video teleconference.

Moreover, Mr. Radford was neither under hospitalization nor under frequent supervision by health care providers. See United States v. Sutherland, 656 F.2d 1181, 1201 (5th Cir. 1981) (witness's hospitalization at time of trial rendered her unavailable). Rather, Mr. Radford lived alone in a home behind his daughter's and was only seen by Dr. Harrison once about every two months. (9/23/10 Order p.2; State's Exhibit 1) (App. pp. 101; 44). Mr. Radford was also able to make the August 5, 2010 trip to Washington (for the State's examination) by car accompanied only by his daughter, without any special assistance by healthcare personnel or

medical equipment. Ms. Waters' affidavit indicated that, while the drive between Oregon and Washington had left Mr. Radford feeling "a little disoriented" and "affect[ed] his judgment about direction," he seemed to "snap[]out of it" and "was okay" after "a good night's sleep" (following the drive to Washington) and a "nap in the chair" (after the return drive to Oregon). (State's Exhibit 2) (App. pp. 49-50). The State's "Notice of Unavailability" was actually filed the day *before* the August 5, 2010 teleconference, and there is no indication that there was any adverse change in Mr. Radford's medical condition occurring after the Washington trip. (8/4/10 Not. Of Unavailiability) (App. p. 46).

There are also strong indications in the record that Mr. Radford's health had improved substantially since his September 2009 stroke. In or around April 2010, the State notified defense counsel that the scheduled telephonic deposition of Mr. Radford would not be feasible because Mr. Radford could not communicate verbally, necessitating the need for defendant to mail out deposition questions in advance to permit Mr. Radford to type out his answers. (9/15/10 Tr.

p.31 L.7-23, p.40 L.2-7, p.40 L.19-p.41 L.11) (App. pp. 71, 80-81). However, by August 2010 Mr. Radford was able to travel to Washington to verbally participate in the State's examination by live video teleconference. (9/15/10 Tr. p.40 L.8-11) (App. p. 80). Dr. Harrison's affidavit also supported a finding of substantial improvement, stating that "[a]t this point in time [Mr. Radford] is almost back to baseline..." and "his risk factors are well controlled with medication...." (State's Exhibit 1) (App. p. 44).

While Dr. Harrison's affidavit did express the "belie[f] that it would be against Mr. Radford's best interest to travel such a long distance for a court proceeding" in Iowa, his affidavit also made no mention of the approximately 300 mile (5 hour) round-trip car ride Mr. Radford undertook between Oregon and Washington over a two-day period to participate in the State's August 5, 2010 recorded examination. (State's Exhibits 1 and 2) (App. pp. 44, 49-50). Indeed, the August 5, 2010 trip was not accomplished until two days *after* Dr. Harrison's affidavit was executed. It is not clear Dr. Harrison, who only saw Mr. Radford once every two months, was aware

of this planned trip or took it into consideration in rendering his conclusion regarding the advisability of Mr. Radford's travel to Iowa. (State's Exhibit 1) (App. p. 44).

Because the State failed to establish that Mr. Radford was an unavailable witness, both Confrontation Clause and hearsay principles prohibited the admission of his recorded testimony in lieu of his personal appearance at trial. Crawford, 541 U.S. at 51, 124 S.Ct. at 1363, 158 L.Ed.2d 177 (admission of prior testimony under confrontation clause requires witness unavailability); Iowa R. Evid. 5.804(a)-(b) (excluding former testimony from hearsay rule only if declarant is unavailable witness).

2. Prior opportunity to cross-examine:

Rainsong did not waive, forfeit, or otherwise 'squander' an opportunity to cross-examine Mr. Radford merely by (a) failing to exercise his right to conduct a pre-trial discovery deposition of that witness or (b) failing to participate in the State's August 5, 2010 recorded examination of the witness.

It is true that "admissibility under [the Crawford] exception is not judged by the use made of the opportunity to

cross-examine but rather the availability of the opportunity." Kenneth S. Broun, et. al. McCormick on Evidence § 302 (6th ed. 2006). Thus, if an actual on-the-record examination of a witness is taken under oath in the Defendant's presence, and the Defendant fails either to conduct any cross-examination at all or fails to conduct a sufficiently detailed and probing cross-examination, the defendant may be held to have squandered the opportunity to cross-examine the witness. See California v. Green, 399 U.S. 149, 165-66, 90 S.Ct. 1930, 1938-39, 26 L.Ed.2d 489 (US 1970) (opportunity for cross-examination of witness at preliminary hearing may satisfy confrontation clause where witness is subsequently unavailable); United States v. Avants, 367 F.3d 433, 444 (5th Cir. 2004) (defendant's attorney had requisite opportunity and similar motive to cross-examine co-defendant at defendant's preliminary hearing, and actively did so).

However, it is also true that "the opportunity to cross-examine must have been such as to render the cross-examination actually conducted or the decision not to cross-examine meaningful in light of the circumstances prevailing

when the former testimony was given." Kenneth S. Broun, et. al. McCormick on Evidence § 302 (6th ed. 2006). In the instant case, it is clear that no cross-examination of Mr. Radford was "actually conducted," in that Rainsong never examined Mr. Radford. Moreover, the circumstances were not such as to render "the decision not to cross-examine meaningful...." Id. Rainsong was thus not afforded sufficient prior opportunity to cross-examine Mr. Radford and did not waive or forfeit that right.

a. Defendant did not waive or forfeit the opportunity for cross-examination of Mr. Radford by repeatedly insisting on the witness's presence at trial.

The State takes issue with the district court's conclusion that a waiver of the confrontation right "is effective only if it is clear and intentional." (9/23/10 Order) (App. p. 103). The State argues that "[c]ontrary to the district court's conclusion, the waiver of the right of confrontation need not be the voluntary and intelligent relinquishment of a known right." (State's Br. p.20). In support of this proposition, the State cites cases holding that confrontation rights may be lost if the

defendant fails to assert them, engages in misconduct at trial, contributes to the unavailability of the witness, or squanders an opportunity to cross-examine the witness. (State's Br. p. 20-21).

The Iowa Supreme Court, in State v. Hallum, discussed the distinction between "forfeiture" and "waiver" of the confrontation right. Hallum, 606 N.W.2d at 354 ("Ascertaining the appropriate theory is important because the applicable theory will determine the test to be applied...."). "A forfeiture... is the loss of a right as a result of misconduct." Id. at 355. See also Crawford, 541 U.S. at 62, 124 S.Ct. at 1370, 158 L.Ed.2d 177 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds...."). In contrast "a wavier is an intentional relinquishment of a known right." Hallum, 606 N.W.2d at 354. This definition of "waiver" has been applied in cases involving the question of whether a defendant was properly afforded a prior opportunity for cross-examination of an unavailable witness. See Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255 (1968) (waiver requires

"intentional relinquishment or abandonment of a known right or privilege."); State v. Dean, 332 N.W.2d 336, 339 (Iowa 1983) (same).

It is clear that, in the instant case, Rainsong did not waive his right of confrontation. To the contrary, Rainsong repeatedly asserted and demanded his right to confront Mr. Radford at trial. (Def.'s Exhibit A p.12 L.4-20; 7/29/10 Resistance to Not. of Depo.; 8/5/10 Resistance to Not. of Unavailability; 9/10/10 Resistance to Mot. to Substitute Depo.; 9/15/10 Tr. p.35 L.22-p.53 L.15) (App. pp. 32; 42-43; 47; 61-62; 75-93).

It is also clear, that Rainsong neither engaged in any misconduct nor contributed to the unavailability of the witness as would be necessary to a finding of "forfeiture by wrongdoing" of the confrontation right. Crawford, 541 U.S. at 62, 124 S.Ct. at 1370, 158 L.Ed.2d 177. The delay in trial, which contributed to Mr. Radford's unavailability, was not attributable to the Defendant but was instead the result of the State's delay in instituting the prosecution, and the State's

request for multiple continuances[2] in spite of the Defendant's expressed concern that further delay may result in Mr. Radford's unavailability at trial. (6/1/10 Motion to Continue Trial; 6/4/10 State's Second Motion to Continue Trial; Def.'s Exhibit A p.12 L.4-20; 9/15/10 Tr. p.35 L.22-p.53 L.15) (App. pp. 23-24; 26; 32; 75-93).

However, the State argued to the district court that Rainsong's insistence on a personal face-to-face-confrontation with Mr. Radford in the presence of the jury at trial, and his refusal to agree to the perpetuation of the adverse witness's testimony for use by the State in lieu of the witness's personal appearance at trial amounted to an improper attempt by Rainsong to benefit from Mr. Radford's anticipated unavailability, resulting in forfeiture of the confrontation right.

[2] While the parties jointly requested and obtained the first two-week continuance to secure completion of discovery, the subsequent two-and-a-half month delay in trial resulted from two additional Motions for Continuance made by the State. Defendant did not resist the State's first Motion for Continuance, which requested a delay to permit Mr. Radford's full recovery from a second stroke, but did resist the State's second Motion for Continuance, which was based on the unavailability of another State's witness. (5/5/10 Joint Mot. to Continue; 5/5/10 Order; 6/1/10 Mot to Continue; 6/1/10 Order; 6/4/10 State's Second Mot. to Continue; Def.'s Exhibit A p.11 L.3-p.14 L.25; 7/6/10 Order) (App. pp. 19; 20; 23-24; 25; 26; 31-34; 38).

(9/10/10 Mot. to Substitute Depo. p.6-7; 9/15/10 Tr. p.31 L.18-21, p.33 L.18-21, p.34 L.24-p.35 L.18, p.54 L.7-11, p.57 L.25-p.58 L.5) (App. pp. 58-59; 71, 73, 74-75, 94, 97-98).

Yet, it is clear that the confrontation right encompasses *both* the defendant's opportunity to conduct a face-to-face cross-examination of the witness *and* the right to have the jury view and conduct a face-to-face assessment of the credibility of the witness *at trial.* Kellogg, 385 N.W.2d at 560-62. See also Coy v. Iowa, 487 U.S. 1012, 1020, 108 S.Ct. 2798, 2802, 101 L.Ed.2d 857 (1988) ("The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses...."); Barber, 390 U.S. at 721, 88 S.Ct. at 1320, 20 L.Ed.2d at 258 (emphasizing the importance "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). The Confrontation Clause thus provides a defendant the right to confront the witness *at trial.* See Melendez-Diaz v. Mass.,

___ U.S. ___, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009) ("Absent a showing that the [witnesses are] unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant is] entitled to be confronted with the [witnesses] at trial.") (emphasis in original).

As such, Rainsong had a strong and legitimate interest in securing personal confrontation and cross-examination of Mr. Radford *in the presence of the jury at trial*, particularly in light of Rainsong's concerns that Mr. Radford was being manipulated by his daughter, Patricia Waters. (9/15/10 Tr. p.40 L.19-p.41 L.11) (App. pp. 80-81). Rainsong was not required to give up the right to *trial* confrontation by agreeing to instead exercise the cross-examination right in a non-trial setting. While it is true that, unlike the opportunity for cross-examination, which is "indispensible" to the confrontation right, the opportunity for the jury's observation of the declarant's demeanor is a "secondary concern" which "must sometimes give way to considerations of public policy and the necessities of the case," Kellogg, 385 N.W.2d at 560-62, a

defendant can certainly not be deemed to act improperly merely because he seeks to assert and protect both the primary and secondary rights afforded by the Confrontation Clause. To find otherwise in the instant case would effectively hold Rainsong to have forfeited the confrontation right through the very act of asserting it.

b. Defendant did not waive or forfeit the confrontation right by failing to exercise his permissive but non-obligatory right to conduct a discovery deposition prior to trial.

Rainsong did not waive, forfeit, or otherwise 'squander' an opportunity to cross-examine Mr. Radford merely by failing to exercise his right to conduct a pre-trial discovery deposition of that witness. A defendant's mere entitlement to compel a witness to appear for deposition, particularly where this right is not actually exercised, should not be deemed to satisfy the prior opportunity for cross-examination requirement.

First, it should be noted that, because discovery depositions are not a "stage of trial" within the meaning of Iowa Rule of Criminal Procedure 2.27, no confrontation right even exists with regard to "discovery deposition[s] not taken

for use at trial." Otteson v. Iowa Dist. Court for Linn County, 443 N.W.2d 726, 727-28 (Iowa 1989) (No confrontation right attached and, therefore, none was abridged by placement of defendant behind one-way mirror during discovery deposition). See also Iowa R. Crim. P. 2.27 (Criminal defendant "shall be personally present at every stage of the trial....").

More importantly, however, Iowa Rule of Criminal Procedure 2.13(1) sets forth only a permissive right, not a mandatory obligation, for criminal defendants to depose State's witnesses. See Iowa R. Crim. P. 2.13(1) ("A defendant in a criminal case *may* depose all witnesses listed by the state on the indictment or information....") (emphasis added). Thus, a defendant's failure to depose a State's witness does not indicate waiver of the confrontation right. See Kenneth S. Broun, et. al. McCormick on Evidence § 302 (6th ed. 2006) ("[T]he opportunity to cross-examine must have been such as to render the cross-examination actually conducted *or the decision not to cross-examine meaningful in light of the circumstances....*") (emphasis added). See also Blanton v. State, 978 So.2d 149, 155 (Fla. 2008) (Fact that defendant had

opportunity to depose victim but declined to do so was not "a waiver of his right to confrontation" because it was not "an intentional relinquishment or abandonment of a known right or privilege," particularly in light of the fact that the burden for perpetuating testimony of a potentially unavailable State's witness lies with the State.).

If the defendant's legal right to conduct discovery depositions under the rules of criminal procedure is equated with a pre-trial "opportunity for cross-examination" even where the defendant "neglects or declines to depose the witness," then defendants would be deemed to have waived confrontation rights regarding any witness listed in the State's Trial Information or Minutes which subsequently becomes unavailable for trial. Lopez v. State, 888 So.2d 693, 701 (Fla. Dist. Ct. App. 2004). Such a result would permit Rule 2.13 to "effectively eliminate[] the constitutional requirement announced in Crawford, so long as the state can show that the declarant was available for deposition at some time before the trial." Id. (decided under Florida Rules of Criminal Procedure).

Nevertheless, the State suggests that, because Rainsong had knowledge of Mr. Radford's potential unavailability for trial, if Rainsong desired to confront or cross-examine Mr. Radford, he had an obligation to do so by summoning him to a deposition. The State argues that, by failing to exercise the right to depose Mr. Radford, despite having notice that he might become unavailable for trial, Rainsong waived or forfeited his right of confrontation.

Courts have generally rejected similar efforts to shift the burden of effectuating the confrontation right from the State to the defendant. See Blanton, 978 So.2d at 156 ("...[T]he mere existence of [state procedural rule permitting depositions to perpetuate testimony] does not provide defendants with a 'prior opportunity' for cross-examination," particularly in light of the fact that "when a State witness may be unavailable for trial, the burden is on the State to file a motion to perpetuate testimony" under that rule.).

The Iowa Supreme Court rejected an analogous argument in State v. Dean. In that case Defendant William Dean and a co-defendant were charged in the same criminal proceeding.

The co-defendant's attorney took a pretrial discovery deposition of one of the State's witnesses and Dean's counsel was given notice of the deposition but did not attend. At trial, the State notified the district court that it had sought to subpoena the witness but was unable to locate him, and sought to use the witness's discovery deposition in lieu of his live testimony. The trial court concluded that the witness was unavailable and "that [Dean] had opportunity to take or be present at the deposition" and thus granted the State's application to be permitted to use the deposition at trial. However, the trial court also gave Dean the option of obtaining "a continuance to attempt independently to obtain the presence of the as-now unavailable witness," an opportunity which Dean declined. Dean, 332 N.W.2d at 337-38. On Dean's appeal after conviction, the Iowa Supreme Court concluded that introduction of the deposition testimony violated Dean's confrontation rights because the requirement of witness unavailability was not satisfied in that the State had failed to exercise due diligence in attempting to procure the witness's presence at trial. The State argued that, even

assuming witness unavailability had not been shown, "defendant waived his confrontation right by rejecting [the] trial court's offer to grant him a continuance" to independently procure the missing witness for trial. Id. at 339. The Iowa Supreme Court rejected the argument, reasoning that:

> Waiver is "an intentional relinquishment or abandonment of a known right or privilege." [...] In this case there is no indication that, by declining trial court's offer, defendant evinced an "intentional relinquishment or abandonment" of his right to confront the witness.... ***It was not defendant's burden*** *to find [the witness], or* ***to cross-examine him on deposition.*** The burden to produce this witness was on the State....

Id. (emphasis added).

The United States Supreme Court followed a similar rationale in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2540, 174 L.Ed.2d 314 (2009). There, the State argued that the defendant's power to subpoena State affiants to trial obviated the State's confrontation obligation to produce the affiants for cross-examination. Id. ___ U.S. ___, 129 S.Ct. at 1540, 174 L.Ed.2d 314. The Supreme Court rejected this argument, reasoning, in relevant part, as follows:

> [...The Defendant's power to subpoena State's witnesses] is no substitute for the right of confrontation.... Converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.

Id., ___ U.S. ___, 129 S.Ct. at 2540, 174 L.Ed.2d 314.

Similarly, the Defendant's power to depose State's witnesses does not obviate the State's burden to present its case and, if necessary, to perpetuate the testimony of potentially unavailable State's witnesses in a manner that comports with the requirements of the Confrontation Clause. Just as the defendant in Melendez-Diaz did not forfeit or waive his right of confrontation by failing to subpoena the State's affiants to trial, neither did Rainsong forfeit or waive his right of confrontation at trial by failing to conduct a pretrial deposition of Mr. Radford, though he had a state law right to do so. See also Dean, 332 N.W.2d at 339 ("It was not defendant's burden to find [the witness], or to cross-examine him on deposition."); Blanton, 978 So.2d at 156 (Defendant's

failure to perpetuate testimony of State's witness did not result in waiver of confrontation right; burden of filing motion to perpetuate testimony of State's witness lies with State.). Thus, the district court was correct in concluding that "a full and fair opportunity to cross-examine does not equate the full and fair opportunity to attend a deposition." (9/23/10 Order p.4) (App. p. 103).

c. Defendant did not waive or forfeit the confrontation right by failing to participate in the State's August 5, 2010 recorded examination of Mr. Radford, which examination was not a legally authorized deposition to perpetuate testimony.

The State argues that, because Rainsong declined to accept its offer to conduct an August 5, 2010 deposition to perpetuate Mr. Radford's testimony for trial, Rainsong waived the confrontation right.

It is true that parties can stipulate to use a witness's deposition testimony in lieu of the witness's personal appearance at trial. See State v. Yaw, 398 N.W.2d 803, 804 (Iowa 1987) (At defense counsel's request, prosecutor stipulated to admission of minor victims' depositions in lieu of their live testimony at trial.). However, no such stipulation

was entered into by the defendant in this case. Moreover, as noted by the district court in its ruling denying the State's Motion to substitute Mr. Radford's recorded testimony, a criminal defendant has no obligation to assist the State in presenting its evidence against him, whether by perpetuation of adverse testimony or otherwise. (9/23/10 Order p.2) (App. p. 101). Davis v. Washington, 547 U.S. 813, 833, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224 (2006) (Noting that "defendants have no duty to assist the State in proving their guilt"). Because the burden of effectuating the prosecution lies with the State, it is the State, not the defendant, which must take advantage of the available opportunity and procedure for perpetuation of adverse testimony of a potentially unavailable State's witness. See Blanton, 978 So.2d at 156 ("...[T]he mere existence of [state procedural rule permitting depositions to perpetuate testimony] does not provide defendants with a 'prior opportunity' for cross-examination," particularly in light of the fact that "when a State witness may be unavailable for trial, the burden is on the State to file a motion to perpetuate testimony" under that rule.).

The authority for conducting depositions is purely governed by procedural rules and statutes. State v. Hamilton, 309 N.W.2d 471, 477 (Iowa 1981). "Failure to substantially comply with prescribed procedures [for the taking of depositions] may result in exclusion or suppression of the testimony." Id. at 478. Where the State fails to follow necessary procedures, such as "fil[ing] a written application... or obtain[ing] judicial approval" as required by applicable procedural rules, any testimony obtained as a result of the improper procedure is "rendered... inadmissible." Id. (where State failed to obtain the necessary court authorization prior to executing investigative subpoena, testimony obtained as result of the improper procedure was not admissible).

The State contends that its August 5, 2010 recorded examination of Mr. Radford was a "deposition" intended "to preserve the testimony of [Mr.] Radford for trial." (State's Br. p.6, p.9). However, it is clear that such examination was not a legally authorized State's deposition.

The State's authority to conduct discovery depositions is governed by Iowa R. Crim. P. 2.13(3), which permits the State

to depose designated defense witnesses. Iowa R. Crim. P. 2.13(3). Because Mr. Radford was not listed as a defense witness, the State had no authority to depose him under Iowa Rule of Criminal Procedure 2.13(3).

Moreover, while Rule 2.13(3) governs the taking of *discovery* depositions, *evidentiary* depositions intended for the perpetuation of witness testimony for trial are instead governed by Rule 2.13(2). See Iowa R. Crim. P. 2.13(2) (providing for the "taking of the testimony of a prospective witness not included in rule 2.13(1) or 2.13(3), *for use at trial....*") (emphasis added). See also State v. Weaver, 608 N.W.2d 797, 801 (Iowa 2000) (The language of current rule 2.13(3) "makes it clear it is to be used to perpetuate testimony, not for discovery....").

In the instant case, the State did not follow the necessary procedure to depose Mr. Radford for perpetuation purposes under Rule 2.13(2)(a), which requires that the party seeking perpetuation file a request for court authorization to conduct the deposition:

> Whenever the interests of justice and the special circumstances of a case make necessary the taking of the testimony of a prospective witness not included in rule 2.13(1) or 2.13(3), for use at trial, *the court may upon motion of a party and notice to the other parties* order that the testimony of the witness be taken by deposition....

Iowa R. Crim. P. 2.13(2) (emphasis added). The State made no such application to the court to request authorization to depose its own witness for perpetuation purposes.

Because the State failed to follow the necessary procedure to obtain a deposition for perpetuation purposes, the State cannot rely on the August 5, 2010 *ex parte* examination to provide the defendant the necessary "meaningful opportunity for cross-examination" prior to trial. Hamilton, 309 N.W.2d at 478. Rainsong "was justified in concluding that testimony obtained" pursuant to the State's August 5, 2010 examination "would not be a deposition or other testimony that could be used as direct evidence at trial, and that it was therefore unnecessary to cross-examine the witness." Id. In this way, the opportunity for confrontation is not literally equated with the opportunity for cross-examination. Id. at 477 (Investigative subpoena rule "was not

intended to be used as a device to allow the prosecution to perpetuate testimony for trial"; Although rule did "provide... [defendant] the right to be present and cross-examine witnesses subpoenaed to testify under [investigative subpoena provision], and defendant was given that opportunity" this procedure did not sufficiently "afford[] a meaningful opportunity for cross-examination.").

Because Mr. Radford's so-called "deposition" testimony was not taken in compliance with the law, it was not admissible under either Confrontation Clause or hearsay principles. See Id.; Iowa R. Evid. 5.804(b)(1) (setting forth hearsay exception for testimony of unavailable declarant "given... in a deposition *taken in compliance with law....*") (emphasis added).

D. Conclusion: For the reasons stated above, Defendant respectfully requests this Court to affirm the district court's denial of the State's Notice of Unavailability and Motion to Substitute Deposition of Witness, Loren Radford.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if oral argument is granted by the Court.

Respectfully submitted,

STATE APPELLATE DEFENDER

Vidhya K. Reddy

VIDHYA K. REDDY
Assistant Appellate Defender

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Brief and Argument was $47.83, and that amount has been paid in full by the Office of the Appellate Defender.

Vidhya K. Reddy

VIDHYA K. REDDY
Assistant Appellate Defender

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VIDHYA K. REDDY
Assistant Appellate Defender

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